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No. 85-1712

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD J. WILSMANN,

Petitioner,

v.

THE UPJOHN COMPANY
and
UPJOHN HEALTH CARE SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE UPJOHN COMPANY AND UPJOHN HEALTH CARE SERVICES, INC., IN OPPOSITION

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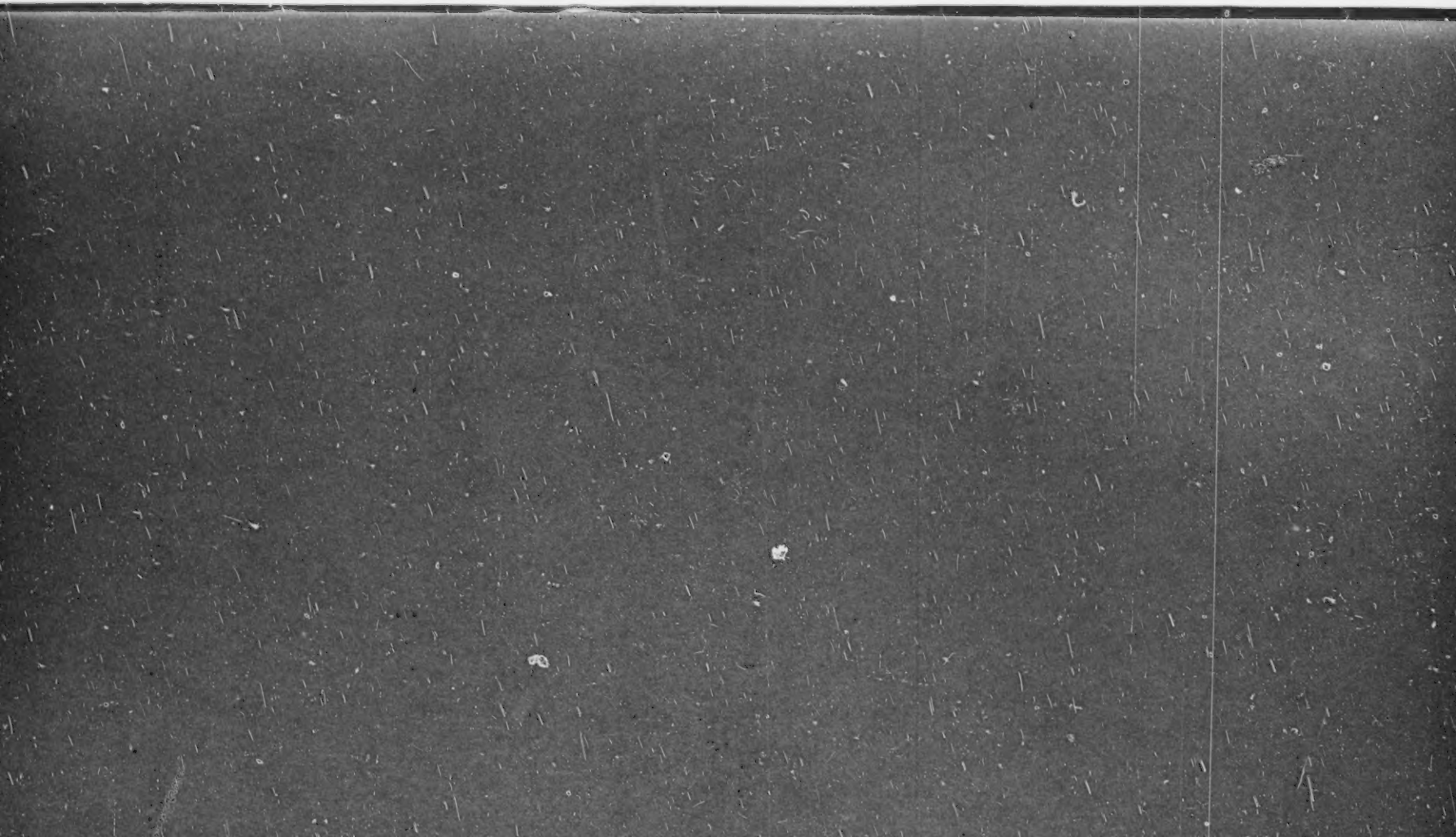

QUESTION PRESENTED

Whether the court of appeals erred in unanimously holding that the trial court should have granted judgment notwithstanding the verdict regarding "implausible" and "conflicting" claims that required the jury to indulge in "sheer speculation," and as to which the jury could not "within reason" have found for plaintiff.

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Pursuant to Rule 22.1 of the Rules of this Court, respondents The Upjohn Company and Upjohn Health

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[1] In accordance with Rule 28.1, respondents state that Upjohn Health Care Services, Inc., is a wholly-owned subsidiary of The Upjohn Company, which in turn has no parent company. The two companies have various subsidiaries and affiliates that are not wholly-owned, but most of those exist outside the United States. Within the United States, such companies include Arkansas Breeders Corp., North Coast Hospital Home Care, Inc., and CARETEC, Inc.

Care Services, Inc. (collectively "Upjohn") oppose the petition for certiorari filed by Edward J. Wilsmann.[2]

STATEMENT OF THE CASE

This case involves claims of federal securities fraud and breach of contract asserted by Wilsmann in connection with Upjohn's acquisition of Homemakers in 1969 and an accompanying employment contract between Upjohn and Wilsmann. Wilsmann's statement of the case is inaccurate and incomplete, but the relevant facts are conveniently summarized in the unanimous opinion of the Court of Appeals for the Sixth Circuit. *See* the Appendix to the Petition ("Pet. App.") at A1. The following statement therefore includes only a brief description of the lengthy record.

Wilsmann is an experienced accountant and businessman who in 1969 was president of Homemakers, a small company then selling franchises for the provision of home health care. By Wilsmann's own estimate, the company was "broke."[3] When Wilsmann was unable to arrange a public offering of Homemakers' stock, he negotiated the company's acquisition by Upjohn. The parties first contemplated an arrangement under which Wilsmann would have been given an investment interest in Upjohn's new Homemakers subsidiary, which Upjohn would have had a later option to purchase. This proposal was abandoned

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[2] Wilsmann's petition includes "Homemakers, Inc.," as a respondent. Homemakers was the company's name in 1969 at the time of its acquisition by Upjohn, but its name has subsequently been altered, and it now exists under the name of Upjohn Health Care Services, Inc.

[3] Trial transcript ("Tr.") 207.

after Upjohn was compelled to lend large sums to satisfy Homemakers' urgent financial needs. The parties instead adopted a different arrangement later in 1969, under which Homemakers became a wholly-owned subsidiary of Upjohn and Wilsmann's proposed investment interest was eliminated. The terms of the acquisition were embodied in a detailed written agreement that was expressly declared to be the parties' "entire" agreement, superseding "all prior agreements and understandings."[4] Wilsmann executed the agreement on behalf of Homemakers.

The parties also agreed that Wilsmann would become an employee of the new subsidiary. Upjohn and Wilsmann entered into a written employment contract that again represented their "entire" agreement, expressly superseding all prior understandings.[5] In addition to salary and other benefits, the employment contract permitted Wilsmann to earn employment bonuses contingent upon the sufficiency of Homemakers' post-acquisition earnings, as determined by an eligibility formula set forth in the contract.[6]

Wilsmann brought this action in 1977, alleging violations of the federal securities laws and breach of contract. His claims were vague and inconsistent, but included allegations that Upjohn had breached the employment contract by failing to pay employment bonuses and had violated the securities laws by failing to make a "back-end" payment assertedly promised to him orally in 1969. At trial, Upjohn moved unsuccessfully for a directed verdict regarding Wils-

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[4] Plaintiff's trial exhibit 2, at page 26.

[5] Plaintiff's trial exhibit 28, at pages 6-7.

[6] Pet. App. at A7, n.13.

mann's securities claim, based in part upon the insufficiency of the evidence. The jury returned a verdict for Wilsmann regarding his claim under the securities laws, but did not reach his contract claims. Following trial, Upjohn filed a timely motion for judgment notwithstanding the verdict. Upon appeal, Upjohn argued in part that the trial court erred in denying a directed verdict and judgment n.o.v. because of the insufficiency of the evidence.[7]

The Sixth Circuit held unanimously that the trial court erred in not granting judgment n.o.v., and remanded the case for further consideration of Wilsmann's contract claims. The court held that Wilsmann's unsupported testimony[8] regarding the alleged oral promise was "in conflict," requiring the jury to indulge in "sheer speculation." Pet. App. A14. It emphasized that Wilsmann's contentions were not

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[7] Upjohn also contended that Wilsmann's claim was outside the scope of the federal securities laws, that it was barred by the statute of limitations, and that the trial court erred in awarding prejudgment interest. The Sixth Circuit did not reach the last two contentions.

[8] Wilsmann's claim that in 1969 he was orally promised a "back-end" payment rests upon his own testimony, without corroborative documentary evidence of any kind. To the contrary, in addition to denying formally such oral understandings in both the acquisition agreement and his employment contract, Wilsmann prepared a lengthy memorandum describing his claims, in which he never suggested that he had been orally promised any "back-end" payment. *See* Pet. App. at A18. Similarly, Wilsmann's claim in the petition that he was supported at trial by Upjohn's witnesses is without basis. To the contrary, Upjohn's chief negotiator in 1969 testified that Wilsmann's investment interest in the abandoned first plan was replaced in the final agreement by an "incentive" based on contingent employment bonuses. Tr. 529.

only "totally implausible" but "also in conflict each with the other." *Id.* at A19. Accordingly, the court of appeals held that a jury "could not within reason" have found that fraud occurred. *Id.*

Wilsmann sought rehearing *en banc,* arguing for the first time that Upjohn had not properly preserved the sufficiency issue for appellate review. The court of appeals unanimously denied rehearing, and this petition for certiorari followed.[9]

REASONS WHY THE WRIT SHOULD BE DENIED

In accordance with Rule 17.1 of the Rules of this Court, certiorari should plainly be denied. The court of appeals did nothing except apply long-established standards for directed verdicts and motions for judgment n.o.v. No relevant conflict regarding those standards exists among the Circuits or with prior decisions of this Court. No other question of federal law is involved, and the matters about which Wilsmann purportedly seeks the Court's guidance are irrelevant to this case. He seeks certiorari merely because he disagrees with the unanimous opinion of the court of appeals regarding the insufficiency of his "conflicting" and "implausible" evidence. Pet. App. A14, A19-20. In these circumstances, there are no "special" or "important" reasons within the meaning of Rule 17.1 that justify certiorari.

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[9] After the mandate of the court of appeals had issued but before this petition was filed, Upjohn moved for summary judgment in the district court regarding Wilsmann's remaining contract claims. Wilsmann filed a cross-motion for summary judgment, arguing in the alternative that the district court should relinquish pendent jurisdiction over the contract claims. The motions are now awaiting decision.

I.

The court of appeals concluded that Wilsmann's securities claim required the jury to engage in "sheer speculation." Pet. App. A19-20. It held that a jury "could not within reason" have found that fraud occurred. *Id.* Based upon these conclusions, it ruled that the trial court erred in denying judgment n.o.v., and remanded the case for consideration of Wilsmann's contract claims. In so doing, the court of appeals applied familiar rules established in numerous decisions by this Court and the courts of appeals.

This Court long ago held that, however the standard for directed verdicts and judgments n.o.v. may be articulated, the "essential requirement is that mere speculation" may not "do duty for probative facts." *Galloway* v. *United States*, 319 U.S. 372, 395 (1943). Accordingly, directed verdicts should be granted whenever necessary to prevent the "mischance of speculation." *Brady* v. *Southern Railroad*, 320 U.S. 476, 480 (1943). Consistent with this Court's instructions, the courts of appeals have repeatedly held that "surmise and conjecture" cannot support a jury verdict. *E.g.*, *Armstrong* v. *Commerce Tankers Corp.*, 423 F.2d 957, 959-60 (2d Cir.), *cert. denied*, 400 U.S. 833 (1970); *Mattivi* v. *South African Marine Corp.*, 618 F.2d 163, 167-68 (2d Cir. 1980); *Aaron Ferer & Sons Ltd.* v. *Chase Manhattan Bank*, 731 F.2d 112, 121 (2d Cir. 1984). *See also Denneny* v. *Siegel*, 407 F.2d 433, 440 (3d Cir. 1969) (jury may not act on "speculation and conjecture"). In this case, the court of appeals unanimously held that this well-settled principle had been violated.

Wilsmann's efforts to postulate some broader issue worthy of review are without basis. In particular, his effort to adduce some "implied" misapplication of *Anderson* v. *City of Bessemer City, N.C.*, ___U.S. ___, 105 Sup. Ct. 1504 (1985), is frivolous. The decision in *Anderson* was not even referred to by the court of appeals. It was not cited in briefs or argument by the parties. The passage in *Anderson* on which Wilsmann unaccountably relies declares merely that speculation cannot support factual findings in non-jury cases. This rule parallels the similar principle declared 40 years earlier for jury cases in *Galloway* v. *United States, supra,* and certainly affords no justification for review of this case. Similarly, Wilsmann's claim that this case offers a suitable vehicle for deciding whether directed verdicts should be judged by the narrow standard suggested in some FELA cases, or by some less rigid standard, is without merit. The court of appeals held that Wilsmann's claims required the jury to engage in "sheer speculation," which warrants a directed verdict under even the most restrictive standard. No question arises here regarding any broader standard.

II.

Wilsmann's petition mistakenly assumes that Upjohn failed to preserve the sufficiency issue for appellate review. As the court of appeals unanimously held, the claim is without merit.[10] At the close of

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[10] Wilsmann did not assert that the sufficiency issue had not properly been preserved until rehearing in the court of appeals, after the issue had already been briefed, argued and decided. Upon rehearing, the court of appeals issued a brief order noting that it had already considered Wilsmann's arguments and that

Wilsmann's case, Upjohn moved for a directed verdict regarding numerous issues, including the sufficiency of the evidence with respect to Wilsmann's securities claim. Counsel analyzed at length the evidence offered by Wilsmann and specifically urged that "there is not sufficient testimony to bring a claim for fraud to the jury. . . ."[11] Counsel went on to argue that the fraud claim was also deficient because Wilsmann's evidence as to reliance was insufficient.[12] In denying the motion, the trial court clearly recognized that the sufficiency issue was before it. The court held specifically that

> "there is sufficient evidence from which a jury could find . . . for the plaintiff on the allegations set forth in . . . [the securities fraud claim] and . . . the motion . . . is denied."[13]

Upjohn again presented the sufficiency issue at the close of all the evidence. Upjohn's counsel offered to reiterate the earlier contentions "[i]n order to preserve our motion for directed verdict."[14] The trial court responded that no further argument was needed, but assured counsel that "the arguments that you made previously" in support of the motion "are preserved."[15] The trial court thereupon again denied the

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"no judge of this Court" had even "requested a vote on the suggestion for rehearing en banc." Pet. App. A22.

[11] Tr. 889-90.

[12] Tr. 890.

[13] Tr. 918.

[14] Tr. 1277.

[15] *Id.*

motion "for the reasons previously stated on the record."[16]

Following trial, Upjohn filed a timely motion for judgment notwithstanding the verdict. While the motion did not specifically reiterate the sufficiency issue, there was no need for repetition. Unlike Rule 50(a), Rule 50(b) does not require a statement of the grounds for relief, but instead provides that the denial of a directed verdict is "deemed" to have submitted the issue to the jury "subject to a later determination of the legal questions raised by the motion." Judgment n.o.v. may thereafter be entered "in accordance with . . . [the] motion for a directed verdict." The motion for judgment n.o.v. is therefore a "renewal" of the motion for directed verdict, *Minton* v. *Southern Ry. Co.*, 368 F.2d 719, 720 (6th Cir. 1966),[17] in which the legal issues presented by the motion for directed verdict are deemed to be reiterated.

In any event, the preservation issue provides no basis for certiorari. No conflict exists regarding the relevant standards, and Wilsmann's only complaint is the application of those standards to the particular facts of this case. The court of appeals unanimously rejected Wilsmann's last-minute contention, and no "special" or "important" reasons within the meaning of Rule 17.1 justify further review.

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[16] Tr. 1278.

[17] *See also Johnson* v. *Rogers*, 621 F.2d 300, 305 (8th Cir. 1980); *Juhnke* v. *EIG Corp.*, 444 F.2d 1323, 1325 (9th Cir. 1971); *Ricker* v. *Zinser Textilmaschinen GmbH*, 506 F. Supp. 3, 6 (E.D. Tenn. 1978), *aff'd*, 633 F.2d 918 (6th Cir. 1980); *Campus Sweater & Sportswear Co.* v. *M.B. Kahn Construc. Co.*, 515 F. Supp. 64, 74 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981).

CONCLUSION

No substantial issue of federal law exists here, and the petition for writ of certiorari should therefore be denied. The district court's pending proceedings to adjudicate Wilsmann's remaining claims should be permitted to go forward without additional delay.

Respectfully submitted,

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